(for example, degree of urgency of acquisition and resultant increase in value of the land). Even in India it is admitted that the list in section 24 of the Indian Act (paragraph 3 of our First Schedule) is by no means, and cannot be regarded as, exhaustive.

I am sure that Chang Min Tat J. in 1974 considered whether the reinstatement principle (or the replacement principle) could be applied in *Island Peninsular Development Berhad* v. *The Collector of Land Revenue, Penang,*[18] and although he decided that the principle could not be applied to that case he however came to the conclusion that "since the principles relating to the determination of compensation in our local Act follow closely section 23 of the Indian Act I propose to hold for the purpose of this decision that the principle of reinstatement is applicable in this country."

In my view the legislative scheme of the Land Acquisition Act, 1960 does not admit of the consideration of the reinstatement principle in the assessment of compensation.

Order accordingly.

Solicitors: *Skrine & Co.*

PUBLIC PROSECUTOR v. LEE WYE KHENG

[A.Cr.J. (Syed Agil Barakbah J.) October 19, 1976]
[Alor Star — Kedah Criminal Appeal No. 44 of 1975]

Customs and Excise — Prohibited goods — Possession of foreign gold coins — Mens rea — Burden of proof — Licence — Customs Act, 1967, s. 135.

The accused was charged with knowingly being in possession of prohibited goods, to wit, 95 pieces of foreign gold coins valued at $14,745 such goods being goods the import of which was prohibited except under and by virtue of an import licence issued by the Comptroller General of Customs. At the conclusion of the case for the defence, the learned Senior President, Sessions Court, Alor Star, acquitted and discharged the accused but made an order of forfeiture of the gold coins under section 127 of the Customs Act. On appeal by the Public Prosecutor.

Held, dismissing the appeal: (1) the learned President was justified on the facts in holding on the balance of probability that the accused had no knowledge that the articles were prohibited;

(2) as the exhibits were prohibited goods, the learned President was correct in ordering their forfeiture.

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Murad bin Sheikh Ismail (Deputy Public Prosecutor) for the appellant.

Karpal Singh for the respondent.

Syed Agil Barakbah J.: The accused Lee Wye Kheng @ Lee Ah Koo was charged as follows: —

"That you, Lee Wye Kheng @ Lee Ah Koo, at about 9.45 a.m. on November 5, 1973 at Kiet Loong Goldsmith No. 1 Jalan Langgar, Alor Star, in the State of Kedah, were knowingly in possession of prohibited goods, to wit, 95 pieces of foreign gold coins valued at $14,745 such goods being goods the import of which is prohibited except under and by virtue of an import licence issued by the Comptroller General of Customs under the Customs (Prohibition of Imports) Order, 1969, P.U.(A) 426/69 and thereby committing an offence under section 135(1)(d) and punishable under section 135(1)(iii) of the Customs Act, No. 62/67."

At the conclusion of the case for the defence, the learned Senior President, Sessions Court, Alor Star, acquitted and discharged the accused but made an order of forfeiture of the 95 gold coins under section 127 of the Act.

The learned Public Prosecutor has now appealed against the order of acquittal and discharge of the respondent who in turn has appealed against the order of forfeiture. For convenience, the Public Prosecutor is named as the appellant and the accused person as the respondent.

There are seven grounds of appeal of which two grounds (c) and (d) were not proceeded with. The remaining five grounds if taken together narrows down to only one main issue, i.e. whether on the facts and circumstances of the case it was probable that the respondent knew that the gold coins seized in his premises are prohibited goods. It was proven by the prosecution and accepted by the learned President in his grounds of judgment that gold coins are prohibited from importation from all countries, including East Malaysia, by virtue of section 3(a) of the Customs (Prohibition of Imports) Order, 1969, (P.U.(A) 426/69) and item 17 of the Second Schedule referred thereto, except under and by virtue of an import licence granted by and on behalf of the Comptroller-General of Customs and subject to such conditions as may be specified in the licence. The learned President also rightly accepted the prosecution evidence that the respondent was in possession of the articles seized in his premises and that in view of the two ingredients having been proved, the presumptions under sections 119 and 135(2) of the Customs Act arose. The latter sub-section presumes that prohibited goods shall be deemed to be so prohibited to the knowledge of the defendant unless he proves it to the contrary. Under section 119 the burden of proof lies on the defendant that such prohibited goods have been lawfully imported under section 3 of the Order. The onus is on the defendant to show either that he had a licence to import the articles or on the balance of probability that he had no knowledge that the articles were prohibited goods.

In considering the defence, the learned President accepted the respondent's evidence that he had two shops, one a licensed pawnshop at Jitra and the other a goldsmith shop at No. 1, Jalan Langgar, Alor Star, and that the articles (Exhibits P1 and P18) were unredeemed jewellery which were pawned at his Jitra pawnshop and subsequently transferred to his goldsmith shop for sale after having obtained clearance from the O.C.P.D., Jitra, that they were not stolen goods. The latter part of the President's contention was attacked by the first ground of appeal as being a wrong conclusion on the facts and in law. I have had the opportunity to examine some of the exhibits in the course of the appeal and find that they are foreign coins mostly Arabic and some of British and American origin. The ninety-five articles are not "loose" coins but have been converted into articles of jewellery in the form of lockets and pendants. The whole coin piece with the two faces still intact or preserved is mounted around its base with a gold

frame of different flowery designs. The frames are easily detachable and that was admitted by the Senior Customs Officer (PW1) who led the customs raiding party to the respondent's shop. When the frame is detached, there is the gold coin intact. According to the list of exhibits on page 2 of the appeal record, there were twenty-three such coins without frames and seventy-two with frames in the form of articles of jewellery. There were a few empty frames without the coins among the exhibits seized. Being foreign, as clearly shown by the inscriptions on the coins, these articles were prohibited articles under item 17 of the Order which states "Gold, gold coins ... bullion and any gold in whatever state or form, including articles of jewellery or ornament (other than reasonable quantity of articles of personal jewellery imported *bona fide* as part of the personal baggage of a person arriving in West Malaysia from a place outside West Malaysia and intended solely for the personal use of such person)." The provision within brackets is vital to the present case. According to the respondent's evidence since running his Jitra pawnshop from 1951, he had been receiving similar articles normally the Arabic coins for pawning from Malay customers who told him that they had bought them from Mecca; some were property from family heir looms. As regards that piece of evidence there seem to be nothing to contradict it in the light of inscriptions on the coins showing their origin and the common knowledge that Malays who perform the Haji Pilgrimage every year are known to bring back reasonable articles of jewellery of gold pieces from Arabia as part of their personal baggage and some of which at some time or later find resting places in the pawnshops. I have had occasion to examine one Arabic gold coin among the exhibits at random and find that the date inscribed on it is "Hijrah 1327", i.e. more than sixty years old. If it has been brought back from Arabia then it must have remained in the family loom for quite a considerable time before it found its way to the respondent's shop. The President also considered two lists relating to the articles of the same type as the exhibits particularly those underlined in red. (Exhibits D21 and D22). The lists contain particulars showing the names of the articles pawned, the date and the names and addresses of the pawnees. On the expiration of eight months when the articles pawned were not redeemed, the respondent prepared the list from the register book and showed them to the O.C.P.D., Jitra, whose representative (DW2) gave evidence to corroborate the fact that it was required under the law for the police to ascertain that these articles are not stolen property prior to giving permission for their disposal. The application was approved by DW2 on behalf of the O.C.P.D. after checking the articles and finding them to be *bona fide*. The list contains only forty-eight pieces of gold lockets and pendants of the type forming the exhibits seized. I was assured by the respondent's counsel from the Bar that he has in his possession similar lists which were not produced at the trial and which he was prepared to produce to show that many such articles have been pawned and not redeemed in the past. It is noted that in Exhibit D21 and Exhibit D22 which show dealings within the period of a month or so each, forty-eight such articles have been pawned and not redeemed. In the circumstances, I accept with respect the assurance from the Bar of the availability of other lists of similar articles pawned and unredeemed without the necessity of admitting them in evidence and checking them further. Taking the above into consideration, I am satisfied with the learned President's conclusion that all the exhibits seized came from the respondent's pawnshop at Jitra.

The rest of the grounds can be conveniently dealt with together. The question is whether the learned President erred in law in accepting the evidence of the respondent that he did not know the articles were prohibited goods and thereby acquitted and discharged him without giving consideration to the conflicting version of the testimony of PW1 and that of the respondent.

The first point raised by the learned Deputy Public Prosecutor was that the respondent did not give full co-operation to the customs party by denying he had any foreign coins when asked on two separate occasions and admitted only when PW1 wanted to search his shop. It was admitted part of the articles seized were placed in a tray in the showcase of the business portion of the premises. They would have been visible to any customer. The tray was taken out by the respondent on the request of PW1. The rest of the articles were kept in a safe which were also taken out by the respondent on the request of PW1. I do not consider it reasonable to assume that the articles were concealed in the safe. Where else is the safest place to keep jewellery not exhibited for sale and some of which are damaged other than in an iron safe in the shop. I do not think the conduct of the respondent in failing to be co-operative with the customs party can be taken in the circumstances of the case as to point to knowledge that the articles were prohibited. There was the permission from the police on the strength of Exhibit D21 and Exhibit D22, the articles having been accepted as *bona fide* dealings in the pawnshop and not stolen goods; some were displayed for sale in the showcase and some kept in the safe. Most of them were in the form of jewellery except for the loose coins with some frames damaged. In short, the precautions taken by the respondent pointed to a dealing above board. Were he to know that they were prohibited goods, he would not in the first place have received them in pawn, nor in the second place brought to his goldsmith shop for sale. They would, if accepted by the pawnshop, have been kept or disposed of somewhere else or without delay melted and manufactured into other ornaments.

The last point is regarding the permit to deal in gold under section 5 of the Exchange Control Act, 1953. (Exhibit P19). The learned President considered it in his grounds and concluded that the respondent had no personal knowledge of the condition at paragraph (d) thereof. In the circumstances of the case, I cannot quarrel with his decision. They may answer the description as gold coins or medallions with inscriptions or pictorial reliefs if they are loose coins and not already manufactured into articles of jewellery. Some are no doubt loose with frames damaged which clearly indicate they have been manufactured into jewellery well before they were brought to the

respondent's shop as evidenced by the lists of unredeemed articles examined by DW1, Inspector Amiruddin. The fact that the learned President did not consider the respondent's evidence that he (respondent) did not manufacture the exhibits Exhibit P1 to P18 does not, to my mind, weaken the defence story but rather strengthens the other facts stated above, i.e. that on the balance of probability he did not know that the exhibits were prohibited goods under the Customs Act. I hold that the President's conclusion to the effect is proper and justifiable. The order of acquittal of the respondent of the charge is confirmed. The appeal is hereby dismissed.

With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned President. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, i.e. the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They are liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of section 127 of the Customs Act applies on all fours. The cross-appeal is therefore dismissed and the order of forfeiture of the exhibits confirmed.

Appeal and cross-appeal dismissed.

Solicitors: *Karpal Singh & Co.*

MOHAMED ZAINUDDIN BIN PUTEH v. YAP CHEE SENG

[O.C.J. (Hashim Yeop A. Sani J.) November 4, 1976]
[Ipoh — Civil Suit No. 416 of 1976]

Injunction — Dissolution — Affidavit omitting material facts — Principles applicable.

This was a Notice of Motion for an order that the interlocutory injunction granted on October 11, 1976, be set aside. It would appear from the notice as well as the affidavits supporting the application that the sole ground of the application that the injunction be set aside was that the plaintiff had not stated the facts fully and accurately to the court and that he had not disclosed all material facts.

Held: applying the principles in *American Cyanamid Co.* v. *Ethicon*, the motion to dissolve the injunction should be dismissed, as there was a serious question to be tried and therefore measures should be taken to preserve the *status quo*.

[**Editorial Note:** An appeal from this decision was dismissed by the Federal Court (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) on April 4, 1977, Federal Court Civil Appeal No. 145 of 1976.]

Cases referred to:-

(1) *Schmitten* v. *Faules* [1893] W.N. 64.
(2) *Daglish* v. *Jarvie* (1851) 20 L.J. Ch. 475.
(3) *American Cyanamid Co.* v. *Ethicon* [1975] 2 WL.R. 316.
(4) *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.* E.R. Vol. 41.
(5) *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628.
(6) *Cavendish House (Chettenhan) Ltd.* v. *Cavendish-Woodhouse Ltd.* [1970] R.P.C. 234.
(7) *Fellowes* v. *Fisher* [1975] 3 W.L.R. 185.
(8) *Hubbard* v. *Pitt* [1975] 3 All E.R. 10 C.A.

CIVIL SUIT.

Lim Seong Chun for the applicant/defendant.

Lim Boon Seng for the respondent/plaintiff.

Hashim Yeop A. Sani J.: This is a Notice of Motion for an order that the interlocutory injunction granted on October 11, 1976, be set aside. It would appear from the notice as well as the affidavits supporting the application that the sole ground of the application that the injunction be set aside is that the respondent/plaintiff (hereinafter referred to as "the plaintiff") had not stated the facts fully and accurately to the court and that he had not disclosed all material facts. The application was made by the defendant in the original writ who for convenience will be referred to as "the defendant" in this application.

The writ concerned was taken out by the plaintiff on October 8, 1976. In the Statement of Claim the plaintiff alleged that he was the tenant of the whole of premises known as Lot No. 1288, Jalan Ampang, Ipoh, paying a rental of $150 per month to one Tan Beng Kai, the landlord. However, in July 1976, the defendant entered upon the said land and removed the fruit trees from the said land, erected a foundry on the land and among other things dumped and scattered iron pipes, concrete pipes, etc., on the land thus blocking the front and the back entrances to the plaintiff's premises. In the writ the plaintiff asked for an injunction against the defendant or his servants or agents to forthwith remove the fencing encircling the premises and also to remove all obstacles allegedly created thereon by the defendant and the plaintiff also asked for damages. On the same day that the writ was taken out the plaintiff also asked in a Summons-in-Chambers for an interim injunction supported by an affidavit sworn on the same date. In the affidavit the plaintiff attached a copy of the tenancy agreement between him and the said Tan Beng Kai. He alleged in the affidavit that he had always been paying the monthly rental regularly and that with the knowledge of the landlord he started what would appear to be a small factory producing toothpicks in the said premises. But because of the obstacles created by the defendant or his servants or agents as referred to earlier, he had not been able to continue with his business on the said premises. Apart from the copy of the tenancy agreement attached to the affidavit a copy of another document was also attached (MZ 2) which was a letter addressed to the solicitors of the landlord extending the said tenancy for another year. Also attached to the affidavit are several photographs showing the alleged obstacles on the land surrounding the premises. An interim injunction was granted by the Registrar effective up to and including the 11th day of October, 1976. On October 11, 1976, another application was made on behalf of the plaintiff to extend the interim injunction to be effective until the trial of the civil suit. The grounds of the application were the same. An interlocutory injunction was